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No. 84-549

In the Supreme Court of the United States

OCTOBER TERM, 1984

IRVING M. DROBNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of aiding and abetting a violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j (b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, when his co-defendant's fraud, which petitioner was found to have aided and abetted, rather than petitioner's own fraudulent acts, caused the securities transaction at issue.

2. Whether the trial court committed plain error in instructing the jury that knowledge could be inferred from proof that petitioner "deliberately closed his eyes to what would otherwise be obvious to him" without also instructing that petitioner must have been aware of "the high probability" of the existence of the securities fraud.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute and regulation involved	2
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

A. T. Brod & Co. v. *Perlow*, 375 F.2d 393	9
Brennan v. *Midwestern United Life Insurance Co.*, 417 F.2d 147, cert. denied, 397 U.S. 989	12
Cupp v. *Naughten*, 414 U.S. 141	15
Davis v. *Davis*, 526 F.2d 1286	9
Griego v. *United States*, 298 F.2d 845	13
Hooper v. *Mountain States Securities Corp.*, 282 F.2d 195, cert. denied, 365 U.S. 814	10
Jannes v. *Microwave Communications, Inc.*, 461 F.2d 525	10
Lewelling v. *First California Co.*, 564 F.2d 1277	9
Nye & Nissen v. *United States*, 336 U.S. 613	10
Ohashi v. *Verit Industries*, 536 F.2d 849, cert. denied, 429 U.S. 1004	9
Pereira v. *United States*, 347 U.S. 1	10
SEC v. *Holschuh*, 694 F.2d 130	12
Superintendent of Insurance v. *Bankers Life & Casualty Co.*, 404 U.S. 6	9, 10
United States v. *Aulet*, 618 F.2d 182	14
United States v. *Bright*, 517 F.2d 584	14
United States v. *Cincotta*, 689 F.2d 238, cert. denied, 459 U.S. 991	14
United States v. *Diecidue*, 603 F.2d 535, cert. denied, 445 U.S. 946	10
United States v. *Dozier*, 522 F.2d 224, cert. denied, 423 U.S. 1021	14

Cases—Continued: Page

United States v. *Glick*, 710 F.2d 639, cert. denied, No. 83-454 (Jan. 23, 1984) 14
United States v. *Gullett*, 713 F.2d 1203, cert. denied, No. 83-432 (Jan. 16, 1984) 13
United States v. *Hathaway*, 534 F.2d 386, cert. denied, 429 U.S. 819 10-11
United States v. *Jewell*, 532 F.2d 697, cert. denied, 426 U.S. 951 ..... 13, 14
United States v. *Johnson*, 319 U.S. 503 11
United States v. *Joyce*, 542 F.2d 158, cert. denied, 429 U.S. 1100 13
United States v. *Kershman*, 555 F.2d 198, cert. denied, 434 U.S. 892 13
United States v. *Lovasco*, 431 U.S. 783 8
United States v. *Massa*, 740 F.2d 629 13
United States v. *Morales*, 577 F.2d 769 14
United States v. *Petullo*, 709 F.2d 1178 13
United States v. *Riedel*, 126 F.2d 81 12
United States v. *Sampson*, 371 U.S. 75 12
United States v. *Suttiswad*, 696 F.2d 645 14
United States v. *Tzakis*, 736 F.2d 867 10
United States v. *Valle-Valdez*, 554 F.2d 911 14

Statutes, regulation and rules:

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 10(b), 15 U.S.C. 78j(b) 2, 8, 10, 12
§ 32, 15 U.S.C. 78ff 2
18 U.S.C. 2 ..... 2, 10
17 C.F.R. 240.10b-5 ..... 2, 8, 9, 10
Fed. R. Crim. P.:
Rule 30 14
Rule 52(b) 14

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 734 F.2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1984. A petition for rehearing was denied on July 5, 1984 (Pet. App. 16-17). On September 5, 1984, Justice White extended the time within which to file the petition for a writ of certiorari to and including October 3, 1984 (Pet. App. 18), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, are reproduced at Pet. App. 19-21.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of aiding and abetting a fraudulent securities transaction, in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78ff, and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. He was sentenced to a four-year term of imprisonment.[1]

1. The evidence at trial showed the existence of a scheme by which petitioner's co-defendant Frederix DeVeau purchased a controlling interest in the stock of Jet Industries, Inc., and thereafter used Jet's assets to pay for that stock and for other non-corporate purposes. DeVeau initially acquired a controlling interest in a shell corporation (Pet. App. 2; R. 102-105).[2] Misrepresenting himself as president of a successful company, and as an experienced engineer and businessman, he began negotiations with the controlling shareholders of Jet (R. 400-406).[3] DeVeau of-

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[1] Petitioner's co-defendant Frederix DeVeau was convicted on the securities fraud count and on six other counts; he was sentenced to a total of 20 years' imprisonment. DeVeau and petitioner were both acquitted of a charge of conspiracy.

[2] "R." refers to the trial transcript. "Tr." refers to the separately-paginated transcript of the closing arguments and jury instructions.

[3] Jet was a small, publicly held Texas-based company engaged in manufacture of electric cars (R. 392-395, 678-680). Although Jet had a substantial amount of cash, the company

fered to buy the controlling block of Jet stock if he could become its chief executive officer (R. 614-616, 682-683, 720). He agreed to pay $1,190,000 for the block of stock with a cash down payment of $600,000 and the balance to be paid with a promissory note secured by the Jet stock (R. 752-753; GX 37).[4] DeVeau failed to disclose that he had a prior criminal record and that he intended to use Jet's assets to pay for the stock and to pay personal debts (R. 617-619, 664). He falsely represented that he would buy the stock with money from a "family trust," or with funds borrowed on the strength of his own credit (R. 619, 625-626, 629-630).

DeVeau, who had no funds of his own (R. 98-99, 1321-1322), carried out his plan by obtaining the short-term loan of the cash down payment with assurances of prompt repayment. DeVeau borrowed $300,000 from a bank and three investors on a short-term basis and enlisted the aid of petitioner, a Chicago lawyer who was heavily in debt,[5] to raise the

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was losing money and was actively seeking new management (R. 395-399).

[4] The transaction contemplated that the sellers would retain an interest in the company and its management, in addition to their security interest in the stock (R. 636-637, 688, 707). The sales agreement required DeVeau to covenant, inter alia, that he would "exercise due diligence to see that the affairs of Jet Industries, Inc., are carried on in a reasonable, business-like manner" (GX 37, Exh. 1, at 3).

[5] In April 1982, when DeVeau's purchase of Jet stock occurred, petitioner owed approximately $900,000 to Chicago banks (R. 1847). Petitioner was the beneficial owner of a large block of stock of the shell corporation DeVeau previously had acquired. That stock, which was worthless, had been pledged as collateral for a loan that was in default by late 1981. Pet. App. 3.

balance (R. 1436-1440). In return for DeVeau's promise of a $200,000 finder's fee (R. 1688), petitioner obtained a cashier's check for $300,000 from an associate, Joseph Rosin, for DeVeau to use in making the down payment on the stock. Petitioner promised Rosin that he would negotiate the check only if he received another cashier's check for $300,000 plus a $30,000 fee at the stock closing (R. 352-354). Petitioner nevertheless signed the check over at the April 8, 1982 closing without arranging to recover the money (R. 1690-1695). Immediately after the closing, petitioner and DeVeau were elected as Jet directors, and a short time later DeVeau became chairman of the board (R. 416, 821).

On April 13, five days after the closing of the stock purchase, DeVeau, with petitioner's help, arranged to pay all of the short term advances he had used to make up the down payment. DeVeau repaid the portion of the down payment raised from the bank and from outside investors by misappropriating funds Jet had set aside for operating expenses (R. 215-217, 221-222, 689-691). When petitioner learned that day that DeVeau had no money to repay the loan from Rosin, he and DeVeau devised a means of obtaining the $330,000. They visited DeVeau's banker, and, at petitioner's insistence, the bank issued a $330,000 cashier's check in exchange for petitioner's personal check (R. 227-228). According to the banker, he provided the cashier's check because petitioner falsely represented that he was a Chicago bank director, that he had credit in Chicago, and that he would cover his personal check before it passed through collection channels (R. 224-228, 235-236). Petitioner immediately used the cashier's check to repay Rosin (R. 358-359). Contrary to his representa-

tions to DeVeau's banker, petitioner made no effort to place covering funds in his account (R. 1820-1824). On April 21, DeVeau paid $330,000 of Jet's money to his banker to cover petitioner's insufficient-funds check (R. 238-240, 244-245).

With petitioner's help, DeVeau prevented the sellers and the Jet board of directors from discovering that Jet funds were being used to repay DeVeau's down payment. One of the sellers testified that petitioner had represented even before the closing that he was investing the $300,000, rather than supplying short-term financing (R. 688). After April 13, the date petitioner obtained the $330,000 cashier's check from DeVeau's banker, petitioner represented to at least one Jet director that Rosin had not been repaid his $300,000 contribution to the down payment; and for months thereafter petitioner continued to deny that that contribution had been repaid (R. 454-455). In May 1982, petitioner informed the Jet board of directors that he was holding $1,000,000 of Jet money in trust to shield the money from attachment by creditors (R. 436-437, 438-439, 697-698, 1207-1208). In fact, petitioner never held those funds; instead, they were controlled by DeVeau, who used them to cover petitioner's $330,000 insufficient-funds check and to pay $165,000 of petitioner's finder's fee (Pet. App. 5-6; R. 239-243, 693-695, 775-784; GX 30, 60, 71-73).[4]

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[4] DeVeau had promised petitioner a $200,000 finder's fee for producing the $300,000 at the time of the closing (Pet. App. 4; R. 1687-1688, 1692-1693). Petitioner testified that $100,000 of the $165,000 payment he received was a personal loan from DeVeau (R. 1733-1737). On its face, however, the cashier's check for $100,000 states that Jet Industries, not DeVeau, purchased the check (GX 70B).

During the trial, petitioner attempted to establish that he, like other participants in the DeVeau takeover of Jet, was merely an innocent victim. He denied that he had intended to assist the fraud when he wrote a worthless check in exchange for repayment of half of the down payment for the Jet stock (R. 1707-1708). In addition, he disclaimed any knowledge that DeVeau was using Jet funds either to repay the down payment or to pay petitioner's fee for raising the $300,000 (R. 1708-1709). Petitioner admitted lying to Jet directors and shareholders about the repayment of the $300,000 he had raised for the down payment and about the location of Jet funds (R. 1744-1746, 1837-1840), but maintained that he was not trying to hide DeVeau's looting of the company's assets (R. 1747-1748, 1837-1838).

There was evidence at trial that could have led the jury to reject petitioner's testimony. A month before the closing, a Jet shareholder who had introduced DeVeau to Jet's management had warned petitioner that DeVeau could not lawfully use Jet assets to purchase Jet stock (R. 412-413). By the time of the closing, a number of the participants in the transaction knew that, even if DeVeau did have a "family trust," the money from that trust was not available to buy Jet stock (R. 199-201, 407-408, 618-619, 663-664). Two participants in the Jet deal had informed petitioner of DeVeau's earlier inability to raise money to purchase the Jet stock (R. 410-411, 1436-1438, 1481-1482, 1669, 1685).[7] One witness recounted a

[7] In February 1982, DeVeau had tried to raise a $300,000 down payment for the Jet stock by pledging a Jet-owned certificate of deposit. On discovering this, the sellers broke off the negotiations (R. 622-628, 664-665). Petitioner admitted at trial that he had been aware of the prior negotiations;

conversation in which petitioner admitted that on April 13 he had believed that DeVeau was using Jet assets to pay for the Jet stock (R. 1486-1490, 1510).

2. Petitioner was prosecuted on the basis of his overall complicity in the fraudulent scheme. The trial court's instructions allowed the jury to consider whether petitioner had knowingly participated with DeVeau in a "common plan" to defraud the sellers of Jet stock (Tr. 259-260). The court's "aiding and abetting" charge stated that the jury could find petitioner guilty if he substantially and willfully assisted DeVeau's fraudulent scheme (Tr. 261-262). The court instructed the jury that it could infer knowledge of the fraudulent scheme on petitioner's part if it found "willful blindness" to the existence of facts (Tr. 247). The court cautioned the jury that "[a] showing of negligence or mistake is not sufficient to support a finding of willfullness or knowledge" (Tr. 247). Petitioner's only objection to those instructions concerned the "willful blindness" language (Tr. 115-116). He contended that the charge effectively converted the required mental state "from knowledge to something else which really [comes to] negligence" (Tr. 115).

3. The court of appeals affirmed petitioner's conviction (Pet. App. 1-14). The court rejected petitioner's challenge to the adequacy of the trial court's "willful blindness" instruction. The court noted that its precedents did not require that a "deliberate ignorance" instruction be accompanied by an instruction that the jury could find knowledge only if it

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although he denied knowing that DeVeau had been unable to raise enough money, petitioner described DeVeau's previous attempts to close the transaction as "the Perils of Pauline" (R. 1669, 1685, 1828-1830, 1832-1833).

found that the defendant was aware of a "high probability" of the existence of a fact (*id.* at 10-11). The court also concluded that, contrary to petitioner's claim, there was ample evidence from which a jury could conclude that petitioner knew that DeVeau was covering petitioner's insufficient-funds check with Jet funds (*id.* at 11-13).[8]

ARGUMENT

1. Petitioner contends (Pet. 11-20) that as a matter of law his conduct did not occur "in connection with" a purchase or sale of securities, as required by Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. He asserts that the only misconduct of which he was convicted consisted of the April 13th transaction in which he exchanged his insufficient-funds personal check for the $330,000 cashier's check, which was subsequently covered with Jet funds. Petitioner contends that this conduct could not have violated Section 10(b) because it did not precede or cause the April 8th closing of the fraudulent securities transaction. Petitioner acknowledges (Pet. 12 n.14) that he failed to raise this claim in the court of appeals and that the court did not explicitly address the question; accordingly, the claim is not now appropriate for review by this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's contention lacks merit.

Petitioner was convicted of aiding and abetting DeVeau's fraudulent scheme to acquire the stock of Jet Industries, Inc., in order to loot its assets. Even assuming, as petitioner contends, that the "in connec-

[8] The court of appeals also affirmed DeVeau's convictions. It rejected DeVeau's claim that his trial should have been severed from that of petitioner. Pet. App. 7-10.

tion with" language requires that fraudulent conduct precede and cause the purchase or sale of securities,[9] petitioner was properly convicted, since DeVeau's scheme unquestionably caused the April 8th securities transaction. It is sufficient that DeVeau's scheme was "in connection with" a purchase or sale of a security and that petitioner rendered knowing and substantial assistance to that fraud.

The indictment did not allege that the April 13th check transaction constituted the entire scheme to defraud; rather, it identified that transaction as only one of several means used to further the scheme. As charged in the indictment and proved at trial, the fraudulent scheme consisted of several successive steps, including DeVeau's misrepresentation of his background and plan to divert Jet funds; DeVeau's purchase of Jet stock financed in part by petitioner; DeVeau's conversion of Jet assets to repay petitioner and others for funds temporarily advanced to purchase the Jet stock; DeVeau's use of other Jet cash

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[9] Contrary to petitioner's contention, a scheme to defraud in connection with the purchase or sale of securities does not invariably cease at the time a stock closing occurs. Rule 10b-5 prohibits both "'a garden type variety of fraud'" and "'[n]ovel or atypical methods.'" *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 10-11 n.7 (1971) (quoting *A.T. Brod & Co.* v. *Perlow*, 375 F.2d 393, 397 (2d Cir. 1967)). The courts of appeals have properly recognized that certain deceptions that take place after a stock closing, including those that induce ratification of a completed transaction (*Lewelling* v. *First California Co.*, 564 F.2d 1277, 1280 (9th Cir. 1977)), that aim at withholding the purchase price for securities (*Davis* v. *Davis*, 526 F.2d 1286, 1290 (5th Cir. 1976)), or that affect a still-executory term of a securities contract (*Ohashi* v. *Verit Industries*, 536 F.2d 349, 853 (9th Cir.), cert. denied, 429 U.S. 1004 (1976)), retain their connection with the purchase or sale.

for non-corporate purposes; and DeVeau's concealment, with petitioner's active assistance, of the flow of Jet assets toward non-corporate purposes (Indictment, Count 2, para. 3 (incorporating by reference Count 1, paras. 16-26)). Petitioner can hardly maintain that this fraudulent scheme was not "in connection with" a purchase of securities. See *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971) ("in connection with" language requires "deceptive practices touching [the] sale of securities"); *Jannes* v. *Microwave Communications, Inc.*, 461 F.2d 525, 527-529 (7th Cir. 1972) (stock purchase aimed at controlling and looting corporation may form the basis for a Rule 10b-5 claim); *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195, 204 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961) (same).

The district court's instructions on complicity under 18 U.S.C. 2 properly allowed the jury to consider the extent of petitioner's knowledge of, and cooperation in, DeVeau's criminal enterprise. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619 (1949). On the basis of such instructions, the jury could have found from the evidence that petitioner was guilty of violating Section 10(b) as an aider and abettor, even without evidence directly connecting him with each element of the offense charged in the indictment. An aider and abettor need merely associate himself with a criminal venture and knowingly seek to make the venture succeed. *Nye & Nissen* v. *United States*, 336 U.S. at 619; see also *Pereira* v. *United States*, 347 U.S. 1, 11-12 (1954). He need not have participated in every phase of the scheme. *United States* v. *Tzakis*, 736 F.2d 867, 873 (2d Cir. 1984); *United States* v. *Diecidue*, 603 F.2d 535, 557 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United*

States v. *Hathaway*, 534 F.2d 386, 399 (1st Cir.), cert. denied, 429 U.S. 819 (1976). And see *United States* v. *Johnson*, 319 U.S. 503, 518 (1943) (upholding conviction for aiding and abetting tax fraud on the basis of defendants' aid in concealing income of tax evader, even though defendants did not share in making false return).

Petitioner aided and abetted DeVeau's fraudulent scheme in connection with the purchase of securities if at some point during the scheme—whether during the events leading up to the closing, during the looting of Jet, or during the concealment of the scheme from the sellers and directors of Jet—he knowingly aided the scheme. Petitioner played an active role at each of these stages by, inter alia, obtaining half of the funds used by DeVeau in the closing, permitting DeVeau to cover his insufficient-funds check with Jet assets, and lying to Jet's directors about the location of Jet assets. Even if, as petitioner asserts, his knowledge of the scheme did not antedate the closing,[10]

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[10] Petitioner suggests (Pet. 8-9) that the government at trial and the court of appeals conceded that the record would not support a finding that he knew before the closing that DeVeau would repay him from Jet assets. According to petitioner, the prosecution and the court predicated liability exclusively on petitioner's knowledge, on or after April 13, that DeVeau would cover his personal check with Jet money. The government made no such concession. Indeed, it argued expressly that petitioner knew prior to the closing that DeVeau would repay him with Jet funds (Tr. 234-235; emphasis added):

> Now, I ask you, ladies and gentlemen of the Jury, the evidence, we submit, has shown that [petitioner] knew *all along* that what he was getting was Jett [*sic*] money. * * * But, even if you are not convinced of that that he actually knew, I suggest to you that the records certainly

he nevertheless knowingly aided the overall scheme in a significant manner. On April 13, when petitioner kited his personal check, thus giving DeVeau additional time to acquire covering funds from Jet assets, he substantially assisted the scheme. Given the ample evidence of petitioner's guilty knowledge (see pages 6-7, *supra*), his participation in this critical episode was enough to sustain his conviction. Moreover, deceptive schemes include attempts to avoid detection and to hide the continued operation of the scheme. See *SEC* v. *Holschuh*, 694 F.2d 130, 143-144 & n.24 (7th Cir. 1982); *United States* v. *Riedel*, 126 F.2d 81, 83 (7th Cir. 1942). Thus, petitioner's knowing concealment of the ongoing conversion of Jet funds after the closing—including, inter alia, his April 13th activities—also provided a sufficient basis for the conclusion that he aided and abetted DeVeau's overall scheme. Cf. *United States* v. *Sampson*, 371 U.S. 75, 78-81 (1962) (in mail fraud prosecution, lulling letters mailed after victims were defrauded were for purposes of executing fraud); *Brennan* v. *Midwestern United Life Insurance Co.*, 417 F.2d 147, 155 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970) (an aider and abettor can be liable under Section 10(b) for lulling defrauded investors).

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supports the conclusion that he covered his eyes and said, all right, Fred, give me the money. I don't care where it comes from. Give me the money.

The court of appeals focused on the period between April 13 and April 26, because petitioner argued on appeal that there was insufficient evidence that he knew Jet funds were used to cover his April 13th check. But the court also observed that the only evidence indicating that petitioner ever thought he would receive his finder's fee and repayment for the advance of $300,000 from a source other than Jet assets came from petitioner's own testimony—a source the jury was entitled to reject (Pet. App. 13).

2. Petitioner testified at trial that he did not know DeVeau would use Jet funds to repay his short-term loan. The trial court instructed the jury that it could infer knowledge on petitioner's part if petitioner "deliberately closed his eyes to what would otherwise have been obvious to him" (Pet. App. 10 n.2). Petitioner asserts that the trial court erred in failing to temper this "willful blindness" instruction either with language that would permit such an inference only if the jury found a "high probability" of petitioner's awareness of the facts supposedly ignored or with language requiring acquittal if the jury believed petitioner's claim of ignorance. He contends that review of this claim is warranted because of a purported conflict in the circuits.

Petitioner did not ask the trial court to instruct the jury in the terms he now urges.[11] Therefore, the court's failure to give the instruction may be challenged only as "plain error" under Fed. R. Crim. P.

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[11] At trial, petitioner objected to the "willful blindness" instruction on narrow grounds, claiming only that to give the instruction at all would allow the jury to convict him on proof of mere negligence (Tr. 115-116). Every court of appeals that has considered instructions on "willful blindness," "conscious avoidance," or "deliberate ignorance" has rejected the argument that such instructions permit the jury to convict on the basis of negligence. See, *e.g.*, *United States* v. *Massa*, 740 F.2d 629, 643 (8th Cir. 1984); *United States* v. *Gullett*, 713 F.2d 1203, 1212 (6th Cir. 1983), cert. denied, No. 83-432 (Jan. 16, 1984); *United States* v. *Petullo*, 709 F.2d 1178, 1181 (7th Cir. 1983); *United States* v. *Kershman*, 555 F.2d 198, 200-201 (8th Cir.), cert. denied, 434 U.S. 892 (1977); *United States* v. *Joyce*, 542 F.2d 158, 161 (2d Cir. 1976), cert. denied, 429 U.S. 1100 (1977); *United States* v. *Jewell*, 532 F.2d 697, 704 & n.21 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); *Griego* v. *United States*, 298 F.2d 845, 849 (10th Cir. 1962).

52(b). See Fed. R. Crim. P. 30. No court has held that failure to give the instruction petitioner now embraces would constitute plain error.[12] Indeed, several courts of appeals have noted that failure to give such an instruction does not constitute plain error. *United States* v. *Glick*, 710 F.2d 639, 642-644 (10th Cir. 1983), cert. denied, No. 83-454 (Jan. 23, 1984); *United States* v. *Cincotta*, 689 F.2d 238, 243-244 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir.) (on petition for rehearing), cert. denied, 423 U.S. 1021 (1975); see also *United States* v. *Suttiswad*, 696 F.2d 645, 651-652 (9th Cir. 1982). Accordingly, there is no conflict among the circuits on this issue.

Moreover, the court's failure to use the "high probability" language did not prejudice petitioner. In evaluating any challenge to the wording of a partic-

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[12] The cases petitioner relies on in support of his claim that a court must include the "high probability" or similar language in its instructions do not indicate that omission of such language would be plain error in the circumstances of this case. In *United States* v. *Morales*, 577 F.2d 769 (2d Cir. 1978), the court stated, "[o]f course, this is not to suggest that this language is indispensable in every case" (*id.* at 775 n.6). In *United States* v. *Valle-Valdez*, 554 F.2d 911 (9th Cir. 1977), the court reviewed the absence of the "high probability" language to determine whether it was harmless error, since the defendant had made a timely objection (*id.* at 914). The court observed that lack of an objection on "sufficiently specific grounds" had led the court in the past to employ the "plain error" standard. 554 F.2d at 914 n.4 (citing *United States* v. *Jewell*, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976)). In *United States* v. *Aulet*, 618 F.2d 182, 190-191 (2d Cir. 1980), the discussion relied on by petitioner is dictum; the court found that the challenged instruction included "[a]ll of these elements." And in *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975), defense counsel had specifically requested balancing language. See *id.* at 588.

ular jury instruction, it is necessary to consider the charge as a whole. *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). Here the trial court instructed the jury that the evidence must demonstrate that "the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law" before the jury could find that petitioner acted "willfully" (Tr. 246). The court explicitly informed the jury that it could not convict on the basis of a showing of negligence or mistake (Tr. 247). In the context of the charge as a whole, the "willful blindness" instruction created no genuine danger that the jury would convict petitioner on the basis of either negligence or recklessness.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Securities and Exchange Commission

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